United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,060

SAMUEL BLANKEN & CO., INC.,

Appellant,

v.

SHANNON AND LUCHS COMPANY,
a corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

FRIEDLANDER & FRIEDLANDER
Mark P. Friedlander
Mark P. Friedlander, Jr.
Blaine P. Friedlander
Harry P. Friedlander
1210 Shoreham Building
806 - 15th Street, N. W.
Washington, D. C. 20006

Attorneys for Appellant

STATEMENT OF QUESTIONS PRESENTED

1. Where a real estate broker sought and obtained an owner's approval to consider a long-term lease, and was directed by said owner to another real estate broker; and where said first broker obtained an offer from potential lessees and submitted the same to the second broker, and subsequently terms were agreed upon; and where the first broker was excluded by the second broker from participating further, and the second broker obtained all the compensation in the leasing, is the first broker (Appellant) entitled to recover the reasonable value of its services from Appellee (the second broker), the lease agreement having come into existence? —; and

2. particularly, where Appellee claimed in the written lease to have secured the lessees, and where the owner directed Appellee to require the lessees to pay the first broker's compensation, and Appellee did not?

INDEX

TABLE OF CASES

TEXTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,060

SAMUEL BLANKEN & CO., INC.,

Appellant,

v.

SHANNON AND LUCHS COMPANY,
a corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant sued Appellee for the *reasonable value of its services* in procuring tenants and services incidental thereto. The Appellee moved to dismiss the complaint, thus asserting that, although admitting the truth of all the allegations of the complaint, it still did not state a cause of action. The Court granted this motion and dismissed the complaint. This appeal followed.

This Court has jurisdiction of the appeal under Title 28, United States Code, Section 1291.

ASSIGNMENT OF ERRORS

1. The Court erred in granting the motion to dismiss.

2. The Court erred in holding that the complaint did not state a cause of action.

STATEMENT OF FACTS

Appellant was a duly licensed real estate broker in the District of Columbia (¶ 1).[1]

One Beard was the owner of land in the District of Columbia designated as Lot 816, in Square 408 (¶ 2), and the Appellant sought the consideration by Beard of a long-term lease on Beard's property. Beard instructed Appellant to contact the Vice President of the corporate Appellee and to submit and negotiate such a lease with said Vice President (¶ 3).

On July 2, 1963 Appellant met with Appellee's Vice President, and Appellant disclosed the names of the potential lessees (¶ 4). The Appellee thereupon prepared and delivered to Appellant a letter signed by said Vice President (J.A. 11, in Appeal No. 19536 in this Court). Said letter indicated the terms upon which Beard would make the lease, and further stated that Appellant would collect his commissions from the principals. The said Vice President of the corporate Appellee assured Appellant of his desire to cooperate with Appellant.

The terms were not satisfactory to the potential lessees, and they then submitted an offer in writing for a lease for the land, but delivered it to Appellant, who then delivered it to the Appellee's Vice President (¶ 6).

---

[1] References are to paragraphs of Complaint, unless otherwise designated.

Appellee then forwarded said offer to Beard, who gave the Appellee instructions as to the terms of a lease he would accept. The instructions included the decision that Appellant's services were to be paid for by the lessees (¶ 7).

Nevertheless, the Appellee did thereafter exclude Appellant from any of the subsequent negotiations, and failed to provide for the payment of Appellant's services; nor did Appellee advise the lessees of their obligation to pay for Appellant's services. The Appellee knew at all times that the services of Appellant were not to be free, but were to be paid for.

Appellee inserted in said lease the statement that it, the Appellee, had secured the lessees and that this was one of the items of consideration for which it was being paid the full commission on the collection of rents. The other consideration was its services in helping the attorneys prepare the lease, after Appellee had excluded Appellant from participating in such preparation (¶'s 10, 11 and 12).

SUMMARY OF ARGUMENT

Appellant is entitled to recover the reasonable value of its services from Appellee. The Appellee and Appellant are and were real estate brokers, and Appellant contacted the owner and obtained his consent to consider a long-term lease. Appellant then contacted potential lessees, and submitted their offer to lease to Appellee, who had been selected by the owner to negotiate the lease. Appellant continued to seek a suitable lease until it was excluded by Appellee from further negotiations after agreement had been reached. The Appellee obtained all the compensation and was thus unjustly enriched and Appellant, having no agreement for compensation (but it being understood Appellee expected to be paid), is entitled to recover from Appellee either on the theory of unjust enrichment, or under the theory that Appellee disregarded the directions of the owner and concluded the lease without including any provision for

compensation to Appellant; and also on the wrongful exclusion of Appellant from the negotiations, to Appellant's detriment.

ARGUMENT

I

The Complaint Stated a Cause of Action

The motion to dismiss was predicated upon the proposition that Appellee represented the lessees, and that Appellant represented the lessors, and that each principal was to pay its own agent. These are not the facts.

The original contact was made by Appellant with the owner. The owner employed the Appellee to negotiate the lease, thus creating an agency relationship with Appellee, which obviously was not intended to exclude Appellant nor to terminate Appellant's activities.[2]

The lessees (who would in law be in the same position as vendees in a sale) did not promise to pay any commission to Blanken (see *Blanken v. Goldblatt et al,* U. S. Court of Appeals for the District of Columbia Circuit, No. 19536) (also, see *Giovannoni et al v. Waple & James, Inc.*, 70 App. D.C. 229, 105 F.2d 108, wherein the Court stated):

> "It is well decided in other jurisdictions — we have no authority to the contrary — that whenever it appears that the purchaser has not agreed to pay the broker's commission, or has not employed the broker, the purchaser is not liable for the commissions due the broker, nor liable in damages to the broker resulting from his breach of the contract of sale . . . ."[3]

---

[2] Beard knew that Blanken was entitled to be paid, because he expressly instructed that Blanken was to be paid by the lessees.

[3] In Appeal No. 20014, now pending in this Court, the Appellant is seeking to reverse the decision of the United States District Court dismissing a complaint of Appellant against the lessees predicated on the same item sued for herein.

In the case at bar Appellant, after successfully interviewing Beard, then obtained a written memorandum from one of the lessees who was acting for his group, and this memorandum indicated an interest in obtaining a "ground lease (99 years)" (J.A. 11, Appeal 19536 in this Court): but said memorandum was not a promise to pay commissions to Appellant by the lessees. It was after this time that Blanken spoke to Taylor (Vice President of Appellee), but Taylor did not tell Blanken to cease his efforts in regard to this ground lease; but Taylor continued to accept from Blanken written offers by the lessees, and the last one ripened into acceptable terms; and it was *then that Taylor excluded Blanken,* but did not advise Blanken as to the reason for his exclusion.

If Blanken was representing the lessees, under what theory did another real estate broker ignore a colleague with whom he had successfully dealt? The complaint was predicated upon the acts by Appellee in excluding Blanken as well as in the usurpation by Appellee of the efforts of Appellant (Appellant had successfully interested both lessors and lessees in the making of this lease). It is true that Blanken had failed to protect himself with any agreement, oral or written, for the payment of Appellant's compensation; but it is also true that the lessor had directed the Appellee to provide for payment to Blanken by the lessees.

The Appellee failed and refused to do this, and for this failure or refusal Blanken's loss should be redressed by Appellee (see *Harris v. Perl,* 197 A.2d 359, 41 N.J. 455).

For a further ground there is the fact that Appellee is receiving *all* of the compensation for this deal, in spite of its promise to cooperate with Appellant.

II

Another Ground Relied Upon by Appellee in Its Motion for Dismissal Was That the Complaint Did Not Allege That the Sum Claimed Was the Reasonable Value of Appellant's Services

In paragraph 12 of the complaint, which for the purposes of the motion to dismiss is admitted, it was said:

> "12. Plaintiff therefore avers that it is entitled to the reasonable value of its services in obtaining the tenants and in obtaining the offers and submitting same and with being the procuring cause of the lease, and it further avers that after the terms of the lease were agreed upon, the Defendant then failed and refused to allow the Plaintiff to participate in the drawing of the lease, and failed and refused to follow the instructions of its client that the lessees pay the sums due the Plaintiff, which Plaintiff says was in truth and in fact a condition precedent to the lease.
>
> "WHEREFORE, Plaintiff claims of the Defendant the full sum of $50,000.00, with interest from October 1963, plus costs of this suit."

and it may develop that the Appellant has overestimated the value of its services; but such overestimate is certainly not grounds for a dismissal.

III

Appellee Should Not Be Permitted To Retain All of the Compensation for Procuring the Lessees for the Lessor, When Appellant Was the Procuror of Said Lessees

The acts of Appellee constituted an unjust enrichment, in that it accepted and used the services of Appellant, and failed and refused to require the lessees to pay for the same although directed to do so by the lessor.

On the contrary, Appellee refused to allow the Appellant to participate in drawing the lease, kept the making of the lease a secret from the Appellant — and this, in spite of its promise to cooperate — and obtained and retains all of the compensation for the procurement of the lessees (see *Restatement of the Law, Restitution,* paragraph 1).

In *Sickelco v. Union Pacific Railroad Co.* (1940, California), 111 F.2d 746, the facts were entirely different, but the principle of the law is fairly stated:

> ". . . The basis for a recovery quantum meruit is unjust enrichment — that it would not be just for one person to receive a benefit by reason of the labors of another without being compelled the give reasonable compensation therefor."

And in *Carpenter v. Josey Oil Co.*, 26 F.2d 442, 443, it was stated:

> "[3] Quantum meruit refers to that class of obligations imposed by law, without regard to the intention or assent of the parties bound, for reasons dictated by reason and justice. The form of the action is contract, but they are not contracts, because parties do not fix the terms and their intentions are disregarded . . . ."

See, also, *Williston on Contracts (Revised Edition),* Volume V, Section 1479, where it is stated:

> "Where the plaintiff has not an alternate right on an enforceable contract the basis of his recovery is the unjust enrichment of the defendant."

CONCLUSION

The dismissal of the complaint was in error, and the cause should be reversed for answer and trial.

Respectfully submitted,

FRIEDLANDER & FRIEDLANDER

By: _____
Mark P. Friedlander
Attorneys for Appellant

FRIEDLANDER & FRIEDLANDER
Mark P. Friedlander
Mark P. Friedlander, Jr.
Blaine P. Friedlander
Harry P. Friedlander
1210 Shoreham Building
806 - 15th Street, N. W.
Washington, D.C. 20005

TABLE OF CONTENTS

JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

SAMUEL BLANKEN & CO., INC., a corporation
516 Kennedy Street, N. W.
Washington, D. C.

Plaintiff

v.

SHANNON & LUCHS COMPANY, a corporation
Serve Registered Agent:
CT Corporation System
918 - 16th Street, N. W.
Washington, D. C.

Defendant

Civil Action No. 18-'66

COMPLAINT FOR QUANTUM MERUIT FOR SERVICES

1. The Plaintiff is a corporation duly organized and existing under the laws of the District of Columbia. The Defendant is a corporation doing business in the District of Columbia. The amount involved is more than $10,000.00. The Plaintiff and the Defendant were at all times licensed real estate brokers engaged in that business in the District of Columbia.

2. One Samuel R. Beard was the owner of certain real estate in the District of Columbia known and designated for the purpose of taxation as Lot 816 in Square 408.

3. That the Plaintiff contacted said Beard seeking his consideration and approval of a long term lease on the property owned by the said Beard and above described. The said Beard instructed the Plaintiff to contact the Vice-President of the Defendant company for the purpose of negotiating such lease.

4. On July 2, 1963, the Plaintiff met with the Defendant's Vice-President and disclosed to said Defendant the names of the persons who were interested in acquiring a long term lease on the Beard property.

5. That the Defendant corporation did through its Vice-President execute a letter which set forth the terms and conditions under which said real estate could be leased for a period of ninety-nine years.

6. The terms offered by said letter of July 2, 1963, being unsatisfactory to the potential lessees, the said potential lessees, through the Plaintiff, did submit on the 8th day of August 1963, a firm offer for a lease for the land above described for a period of ninety-nine years, with an option to purchase said property running to the tenants at the end of said lease term.

7. The Defendant did thereupon submit said offer to Samuel R. Beard, by letter, and as a result of such submission, said Beard did instruct the Defendant as to the terms of a lease he would accept, and did in such instructions also advise that the Plaintiff's services were to be paid for by the lessees.

8. The Plaintiff was the procuring cause of the lease, had contacted both the landlord and the tenants, had submitted the offer of the lessees to the Defendant, and had divulged the names of the lessees to the Defendant at the time of the first submission.

9. The Defendant not withstanding the facts hereinabove set forth, did negotiate and help prepare a lease between the owners of the property, Samuel R. Beard and his wife, and the lessees under said lease, except that said lease was in the name of a corporation owned and controlled and the alter-ego of the original potential lessees.

10. The said Defendant, not withstanding its obligations under the existing conditions, did prepare the lease without arranging for any payment to the Plaintiff for the services rendered, and did prepare the lease and assert in said lease that this Defendant was appointed the rental agent for the landlord in consideration of its services in securing the tenants and in the negotiation of the lease.

11. That the Defendant failed to advise the tenants that they were required to pay for the services of the Plaintiff, and that the Defendant well knew that the Plaintiff was not a volunteer but was working in order to earn a commission and expected to be paid for the services which were rendered.

12. Plaintiff therefore avers that it is entitled to the reasonable value of its services in obtaining the tenants and in obtaining the offers and submitting same and with being the procuring cause of the lease, and it further avers that after the terms of the lease were agreed upon, the Defendant then failed and refused to allow the Plaintiff to participate in the drawing of the lease, and failed and refused to follow the instructions of its client that the lessees pay the sums due the Plaintiff, which Plaintiff says was in truth and in fact a condition precedent to the lease.

WHEREFORE, Plaintiff claims of the Defendant the full sum of $50,000.00, with interest from October 1963, plus costs of this suit.

FRIEDLANDER & FRIEDLANDER

By Mark P. Friedlander

FRIEDLANDER & FRIEDLANDER
Mark P. Friedlander
Mark P. Friedlander, Jr.
Blaine P. Friedlander
Harry P. Friedlander
Attorneys for Plaintiff

MOTION TO DISMISS COMPLAINT

Comes now the defendant herein and moves the Court to dismiss plaintiff's complaint and for grounds thereof avers as follows:

1. The complaint fails to allege any cause of action against the defendant.

2. The complaint is for quantum meruit, but contains no allegation that the sum claimed is the reasonable value of plaintiff's services.

3. The complaint alleges that the plaintiff represented the lessees and that the defendant represented the lessors, and that compensation to plaintiff was to be paid by plaintiff's own clients the said lessees.

4. The complaint alleges:

A. That plaintiff submitted an offer to lease on behalf of plaintiff's clients, the lessees.

B. That plaintiff in so doing was advised that plaintiff's services were to be paid for by the lessees, plaintiff's clients.

C. That the defendant prepared the lease but did not arrange for payment to the plaintiff for such services as plaintiff rendered.

5. The complaint fails to establish how all or any of the foregoing actions of the defendant preclude, prevent or bar plaintiff from recovery of any compensation to which he may be entitled from its own principals. the persons for whom plaintiff's services were rendered and performed.

/s/ Harry L. Ryan, Jr.
Attorney For Defendant

ORDER DISMISSING COMPLAINT

Upon consideration of defendant's motion to dismiss plaintiff's complaint, plaintiff's opposition thereto, and oral argument of counsel, it is by the Court, this 8th day of February, 1966,

ORDERED That plaintiff's complaint herein be, and the same hereby is dismissed.

JUDGE

[Certificate of Service
February 10, 1966]

NOTICE OF APPEAL

Notice is hereby given this 14th day of February, 1966, that SAMUEL BLANKEN & CO., INC., hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 8th day of February, 1966 in favor of Shannon & Luchs Company against said Samuel Blanken & Co., Inc.

FRIEDLANDER & FRIEDLANDER

Attorney for Plaintiff

Serve:
Harry L. Ryan, Jr., Esq.
Attorney for Defendant

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,060

SAMUEL BLANKEN & CO., INC.,

Appellant,

v.

SHANNON & LUCHS COMPANY,
a corporation,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

HARRY L. RYAN, JR.
815 - 15th Street, N. W.
Washington, D. C. 20005
Attorney for Appellee

STATEMENT OF QUESTIONS PRESENTED

Is a real estate broker which produces the ultimate lessee under a term lease prepared by another real estate broker which represented the lessor therein, entitled to quantum meruit compensation from the latter broker assuming that from the inception of the entire transaction, the lessor's exclusive representation by the second broker was known to the first broker and with the first broker's understanding at all times that its compensation was to be paid it by its own clients, when

1. The first broker was allegedly precluded from actively participating in drawing the lease, and/or

2. The second broker allegedly failed to advise the first broker's own clients that they would be required to pay for its services, or to put any provision in the lease for payment of any compensation to the first broker?

A second question posed is whether or not under the above conditions, the second broker, who received no compensation for "procuring" the lease, is nevertheless unjustly enriched in receiving five (5%) percent of rentals as the same accrue as rental agent for the lessor.

INDEX

TABLE OF CASES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,060

SAMUEL BLANKEN & CO., INC.,

Appellant,

v.

SHANNON & LUCHS COMPANY,
a corporation,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

BRIEF FOR APPELLEE

SUMMARY OF ARGUMENT

1. The only error claimed in this appeal is the dismissal of appellant's complaint for failure to state a cause of action upon appellee's motion to dismiss the same. The only record *herein* is appellant's complaint, appellee's motion to dismiss it, and the Court's order of dismissal. The order of dismissal asserts as its basis, "consideration of defendant's (appellee's) motion to dismiss plaintiff's (appellant's) complaint, *plaintiff's opposition thereto, and oral argument of counsel.*"

The record does not contain plaintiff's opposition, nor the oral argument, and hence this appeal should only consider whether or not appellant's complaint stated a cause of action as a matter of law. This, of necessity, must be without regard to any extraneous matter related by appellant in its brief, and should likewise be without regard to any collateral litigation involving appellant, and appellee or others since the sole matter before the lower court was a motion to dismiss, relegated, as the record presented discloses, solely to the assertion of a cause of action.

2. On the other hand appellant, in this appeal, has seen fit to go beyond the record presented in the lower court in order to expand its position in this Court by (a) referring to an earlier appeal taken (*Blanken v. Goldblatt, et al.*, U. S. Court of Appeals for the District of Columbia Circuit, No. 19536) and by (b) referring to a pending appeal of appellant, No. 20014, brought by appellant against others involved in this same transaction.

3. In either posture, whether upon the bare record brought up to this Court in this appeal, or by incorporation of matters appearing in other appeals, no cause of action is established justifying any recovery by appellant against this appellee.

ARGUMENT

Rule 12(b), Federal Rules of Civil Procedure, provides that a defendant may, by motion to dismiss, question plaintiff's complaint for "failure to state a claim upon which relief can be granted." Defendant-appellee, so moved the lower court, stating in its motion that, "The complaint fails to allege any cause of action against the defendant." J.A. 4.

The aforesaid rule further provides that if, on a motion asserting failure to state a claim upon which relief can be granted, "matters outside the pleading are presented to and not excluded by the Court, the

motion shall be treated as one for summary judgment and disposed of as provided in Rule 56."

Neither Rule requires findings of fact, and none were made in the court's order of dismissal. J.A. 5.

Treating appellee's motion as having been determined solely within those matters shown to be of record on this appeal, and hence within the more narrow limits of Rule 12(b) Federal, appellee submits that the complaint does fail to state any claim upon which any relief can be granted.

In essence the complaint asserts that appellant from the inception of any matters involved herein, represented lessees who obtained a lease for property from the owner thereof, said owner from the beginning of the transaction having advised appellant that it had to negotiate any lease therefor through appellee, and in which transaction, appellant was relegated to receive any compensation to which he might be entitled solely from his own clients, the lessees.

Upon the above premise, appellant asserts that because it did not actively prepare the ultimate lease; that therein appellee was appointed as the owner's *rental agent*; and that appellee failed to advise the lessees that they were required to pay appellant for its services to them that appellee in some legal way has become indebted to appellant for the reasonable value of appellant's services.

Appellant's complaint admits that it knew that its services were obliged to be paid by its own clients and not by the owner nor by appellee. Its sole claim, boiled down to basic simplicity is that its own clients did not pay it; that appellee did not *advise* appellant's clients that they were obliged to pay appellant, and that, accordingly, appellee should pay appellant for procuring the lease.

Appellant has cited no authority for any such nebulous claim in its brief, and it is submitted that none exists.

On the contrary, appellant by vacillating approaches to the single transaction in which it was involved, now suggests to this Court that it (and presumably the lower court) should search the entire record of all that has gone before, and all that is still pending, to reach a conclusion favorable to it. To so do, it would appear that appellant wishes this Court to apply the broad brush of Rule 12(b) to the action of the lower court, and to review all that has gone before in Civil Action No. 336-64 in the United States District Court for the District of Columbia, Appeal No. 19536 therefrom, and in Civil Action No. 1619-65 in the District Court aforesaid, and Appeal No. 20,014 therefrom and to find somewhere there among a basis for appellant's claim herein.

First of all, such is not the function nor the duty of this Court. This Court should take the record presented to it as appellant presents it and is not obliged to become an advocate for appellant, seeking any further records. *T.V.T. Corporation v. Basiliko,* 103 U.S. App. D.C. 181, 257 F.2d 185. Therein this Court said,

> "But the files and records of the previous litigation *are not in the record on this appeal.* Nor have we even been given a transcript of the proceedings before the District Court on the motions for summary judgment. It is the duty of the appellants to designate and file a record sufficient to enable us to pass on the errors of law they claim were committed below. This they have not done."

The above is ample justification for this Court to consider *only appellant's complaint, and appellee's motion to dismiss, since that is the only record on this appeal.*

However, since appellant has gone beyond that record, and has made reference in its brief to the earlier appeal involving the appellee, and the pending appeal, involving the lessees, who were appellant's claimed primary obligors, but who have not paid appellant because appellee failed

to advise them to pay it so it claims, appellee would state as follows, without conceding that the same need even be considered herein.

In its Appeal No. 20014, this appellant, as appellant therein, asserted and relied upon a claim that this appellee, through its Mr. Taylor had, in fact, advised some of the lessees that "Blanken (appellant) to get his (sic) commission from the tenant." (Appellant's Brief p. 4) Appellant further claimed that "the facts establish that the appellees had accepted a lease under the conditions laid down by the lessors that lessees would pay for appellant's services." (Appellant's Brief p. 5.)

This is clearly a judicial admission. It was not and never has been qualified as an alternative or conditional claim. *It is an assertion by the appellant of a fact* upon which he relies in Appeal No. 20014 which is before this Court not upon appeal from a motion to dismiss, but upon an appeal from a motion for summary judgment.[1]

Assuming arguendo, therefore, that appellee herein had provided a lease conditioned upon Appellees in Appeal No. 20014 paying for appellant's services in connection therewith, appellant *a fortiori* could have no claim in this action since the two are repugnant.

In its first action against this appellee, the appellant recited these same facts, claiming to be the procuring cause of the lease, having been barred by appellee from the negotiations and the like. J.A. 3 in Appeal No. 19536. The significant fact however as to this appellee therein is that it never claimed nor did it ever receive a commission for legally being the "procuring cause" of the lease. It represented only the owners in its negotiations for which the owners appointed it as "rental agent" and its sole compensation therein is reflected by the record to be five (5%) percent of the rentals as collected over the term of the lease.

In the first trial the court found, "* * * a lease was signed awarding

---

[1] *Frank R. Jelleff, Inc. v. Braden*, 98 U.S. App. D.C. 180, 233 F.2d 671.

Shannon & Luchs a management contract equal to 5 percent of the annual gross rent. *Accordingly neither Shannon & Luchs nor anyone else has received consideration for having been 'the procuring cause.'"* J.A. 93, Appeal No. 19536.

The above determinations became dispositive of this action when this Court commended the lower court's findings and affirmed without opinion in Appeal No. 19,536.

Of lesser importance herein, but as to which appellee feels a response should be made are the following points raised by appellant.

Lessees did not promise to pay any commission to appellant, and are therefore not liable, citing *Giovannoni v. Waple & James, Inc.*, 70 App. D.C. 229, 105 F.2d 108.

Appellee does not dispute that this case states the law, but the converse, namely that the lessor or lessor's agent would be liable does not follow as a sequitur, *for unless there was an actual employment of the appellant by the lessor it was not entitled to any commission even if it was the procuring cause of the lease. Eggleton v. Vaughn,* 45 A.2d 362 (M. Ct. App. D.C. 1946) J.A. 17, App. No. 20014.

Appellant's statement that "appellee is receiving *all* of the compensation for this deal, in spite of its promise to cooperate with appellant" is highly misleading and is undoubtedly asserted to indicate to the court that appellee is in fact being unjustly enriched and has received thousants of dollars for procuring and negotiating the lease involved herein.

The facts are, as above stated, and as the record fairly discloses, that appellee did not charge, nor has it received one cent from anyone *for procuring the lease* or the lessees. On the contrary the only provision made for the payment to appellee of any compensation was to it under a *management contract for collecting rents as they become due*, at the rate of fifty dollars per month, and not otherwise. Such compensation is accordingly for services being rendered *after* procurement of the

lease, and not for its procurement, and are purely conditional upon continuance of the lessees in occupancy and of its collection of these payments of maturing rentals.

It is therefore crystal clear that the appellee, having neither received nor claimed any compensation for having procured the lease, but only being paid for servicing the same, has not been unjustly enriched in any respect by appellant's efforts. Furthermore, appellant was specifically advised and informed that under no circumstances would it be permitted to be rental or management agent for the premises. J.A. 93, Appeal No. 19536.

Whether appellant's claim for compensation be termed a "commission" or quantum meruit for its services, neither would be due it if, in the overall picture, it was an interloper, providing some services but without any agreement from appellee for payment for the same. J.A. 15, 16, 17, Appeal No. 20014, and J.A. 95, Appeal No. 19536.

CONCLUSION

Absent any sufficient record upon this appeal indicating a basis for determination of appellee's motion to dismiss appellant's complaint, other than that the same failed to state any claim for relief, the dismissal should be affirmed as having been granted as a matter of law.

Alternatively, since the order of dismissal does refer to appellant's opposition to appellee's motion and oral argument thereon, the action of the lower court in dismissing appellant's complaint was still proper, even assuming arguendo that all matters raised in the appeal were before the lower court and considered by it, since no cause of action is even thereby established against the appellee.

Respectfully submitted,

Harry L. Ryan, Jr.
815 - 15th Street, N. W.
Washington, D.C. 20005
Attorney for Appellee